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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

NO. 195.

COLUMBUS & GREENVILLE RAILWAY CO., ET AL., Petitioners and Appellants,

VS.

W. J. MILLER, STATE TAX COLLECTOR, Respondent and Appellee.

STATEMENT AND BRIEF FOR PETITIONERS AND APPELLANTS.

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In The Supreme Court of The United States

OCTOBER TERM, 1930.

NO. 195.

COLUMBUS & GREENVILLE RAILWAY CO., ET AL., Petitioners and Appellants,

VS.

W. J. MILLER, STATE TAX COLLECTOR, Respondent and Appellee.

STATEMENT AND BRIEF FOR PETITIONERS AND APPELLANTS.

B.

REFERENCE TO OPINIONS, SUPREME COURT OF THE STATE OF MISSISSIPPI.

W. J. Miller, State Tax Collector, v. Columbus & Greenville Railway Co., 154 Miss. 317, 122 So. 366; *Columbus & Greenville Railway Co. v. W. J. Miller, State Tax Collector*, 127 So. 784.

C.

STATEMENT OF JURISDICTION.

Paragraph 1, Rule 12, has heretofore been complied with. Authorities in support of the Court's jurisdiction on appeal will be hereinafter set out.

D.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The Mississippi Levee District was organized, Chapter 1, Miss. Laws of 1865. The territory comprised therein included the counties of Washington, Bolivar and Issaquena. Due to the creation of new counties, it now also comprises parts of Sharkey, Warren ad Humphreys Counties.

Sections 236 and 237 of the Mississippi State Constitution are in the following language:

> "Section 236. The legislature shall impose for levee purposes, in addition to the levee taxes heretofore levied or authorized by law, a uniform tax of not less than two nor more than five cents an acre per annum upon every acre of land now or hereinafter embraced within the limits of either or both of said levee districts. The taxes so derived shall be paid into the treasury of the levee board of the district in which the land charged with the same is situated; and the legislature, by the act imposing said tax, shall authorize said levee boards to fix the annual rate of taxation per acre within the limits aforesaid, and thereby require said levee boards, whenever a reduction is made by them in their other taxes, to make a proportionate reduction in the acreage tax hereinbefore mentioned; but said acreage tax shall not be reduced below two cents an acre per annum; and all reductions in such taxation shall be uniform in each of said districts; but the rate of taxation need not be the same in both of them; and

such specific taxes shall be assessed on the same assessment roll, and collected under the same penalties, as the ad valorem taxes for levee purposes, and shall be paid at the same time with the latter. And no levee board shall ever be permitted to buy lands when sold for taxes; but the state shall have a prior lien for taxes due thereto. The legislature may provide for the discontinuance of the tax on cotton, but not in such manner as to affect outstanding bonds based on it, and on the discontinuance of the tax on cotton, shall impose another tax in lieu thereof; but the legislature may repeal the acreage tax required to be levied hereby after the first day of January A. D. 1895."

"Section 237. The legislature shall have full power to provide such system of taxation for said levee districts as it shall, from time to time, deem wise and proper."

The Columbus & Greenville Railway Company is a Mississippi corporation, hereinafter referred to as the company, operating a line of railroad from Columbus, Mississippi, in a westerly direction to Greenville, Washington County, Mississippi, a distance of 169 miles. It runs across the levee district at right angles from the Mississippi River, a distance of 18.41 miles.

Section 1, Chapter 282, Mississippi Laws of 1914, is in the following language:

"Section 1. Be it enacted by the Legislature of the State of Mississippi, That Chapter one hundred and twenty-five of the Acts of 1908, be and the same is hereby amended so as to read as follows:

"That Chapter 7 of the Acts of 1886 be and the same is hereby amended so as to read as follows:

"That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred therefor, by the Board of Mississippi Levee Commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard gauge railroads, not including side tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow gauge railroad or railroads of less width than standard gauge, not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard gauge railroads, not used and operated as a main or trunk line, but constituting and used as a feeder to a branch or a main or trunk line, or to connect such main or trunk line with some other system, the sum of $210.00 per annum; provided that no railroad or branch railroad shall be subject to taxation under this act while the same is in process of construction, but if any part thereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished."

The legislature of the State of Mississippi, owing to matters and things hereinafter set out, was doubtless of the opinion that under the act of 1914, the Columbus &

Greenville Railway Company was being required to contribute a disproportionate amount to the expense of building, maintaining and repairing levees in the Mississippi levee district and in discharging the obligations thereof. Accordingly, in 1926, the following act was passed:

"Mississippi levee district tax on certain lines of railroad reduced.

"Section 1. Be it enacted by the Legislature of the State of Mississippi, That Section 1, of Chapter 282, Laws of Mississippi, 1914, be, and the same is hereby amended so as to read as follows:

"That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred thereof, by the board of Mississippi levee commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard gauge railroads, not including side tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow gauge railroad or railroads of less width than standard gauge, not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard gauge railroad not used and operated as a main or trunk line, but contributing and used as a feeder to or a branch of a main or trunk line, or to connect such main or trunk line with some other system, the sum of $210.00 per annum; provided, that no railroad or branch railroad shall be subject to taxation, un-

der this act while the same is in process of construction, but if any part thereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished; provided further that the tax per mile per annum on the main line of any railroad company which does not own in excess of twenty-five miles of railroad in the Mississippi levee district shall be $50.00 per annum."

That for the years 1926 and 1927, since the main line of the Columbus & Greenville Railway Company did not exceed twenty-five miles in the levee district, it paid to the tax-collector the sum of $50.00 per mile per annum, in accordance with the provisions of the act of 1926. R. 45-46.

The respondent, W. J. Miller, State Tax Collector, for the use of the Mississippi Levee District, is an officer whose duty it is under the statutes of the State of Mississippi to enforce payment of past due taxes and other obligations to the State of Mississippi, or any subdivision thereof, including the Mississippi Levee District.

Upon the 31st day of July, 1928, the state tax collector filed suit in the Circuit Court of Montgomery County, Mississippi, for the recovery of privilege taxes for the years 1926 and 1927, payable to the Mississippi Levee District under Chapter 282, Mississippi Laws of 1914, aforesaid, at the rate of $350.00 per mile. The plaintiff alleged that Chapter 259, Mississippi Laws of 1926, was invalid, in that the same was adopted by the Legislature of the State of Mississippi in disregard of Section 234 of the Constitution of the State of Mississippi. R. 1.

To which declaration the company demurred on the ground that the plaintiff's declaration revealed that it had discharged all liability for privilege taxes imposed upon it by Chapter 259, Mississippi Laws of 1926, which repealed Section 1, Chapter 282, Mississippi Laws of 1914.

The trial court sustained the demurrer and dismissed the action.

On appeal by the state tax collector to the Supreme Court of the State of Mississippi, the court held that Chapter 259, Mississippi Laws of 1926, violated the Fourteenth Amendment to the Constitution of the United States, and was void, and that the company owed to the levee district the mileage tax provided in Chapter 282, Mississippi Laws of 1914, less payments made. The case is reported, *Miller, State Tax Collector, v. Columbus & Greeenville Railway Co.*, 122 So. 366, 154 Miss. 317. The court used the following language at page 323:

> "Chapter 259, Laws of 1926, divides railroads into two classes: First, railroads not having more than twenty-five miles of railroad in the levee district; and, second, all other railroads therein. The ground of the appellant's contention is that this classification has no reasonable relation to the purpose for which the statute was enacted, but is arbitrary and unreasonable, and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. This is so manifestly correct that the citation of authorities therefore would be supererogatory. It will not be necessary for us to decide whether this results simply in the pro-

viso of Chapter 259, Laws of 1926, being void, or in the whole statute being void, for in either event the tax which the appellee will have to pay will be the same, that is, three hundred and fifty dollars per annum on each mile of its railroad in the levee district."

The case was remanded to the Circuit Court of Montgomery County, Mississippi, among other defenses, the company pleaded that Chapter 259, Mississippi Laws of 1926, was consistent with the Fourteenth Amendment to the Constitution of the United States and a valid law thereunder. R. 5.

Said plea contained the following additional language:

> "The said defendant having discharged its liabilities to said Mississippi Levee District under said act, now sets up, alleges and avers that it has acquired, and now has, under the Fourteenth Amendment to the Constitution of the United States, the right, privilege and immunity from further liability for taxes to the said Mississippi Levee District."

The company's plea further alleged that to hold Chapter 259, Laws of 1926, invalid and enforce Chapter 282, Mississippi Laws of 1914, under the facts and circumstances shown by the testimony, against the company, would render such last mentioned act violative of the Fourteenth Amendment to the Constitution of the United States, in that the same would deprive the company of due process of law and deny to it the equal protection of the law. R. 10-11.

At the trial of the case the railway company proved

and offered to prove that at the time of the passage of the act of 1926, and up to the date of the trial of the case, there were but two standard gauge main lines of railroad in the Mississippi Levee District; one, the Yazoo & Mississippi Valley Railroad, an interstate carrier, forming part of the Illinois Central system, operating a railroad extending from New Orleans in the State of Louisiana to Memphis in the State of Tennessee, which railroad extended north and south through the entire levee district parallel with the Mississippi River, approximately 117.15 miles. That it had properties of enormous values, exposed one hundred per cent. to the hazard of an overflow of the waters of the Mississippi River. That said railroad was of modern construction; its road bed, bridges, trestles and equipment were new and modern; its shops, depots and buildings were new and in excellent state of repair; its locomotive engines propelled freight trains carrying ninety to one hundred cars; it was capitalized at approximately twenty-five milion dollars, the capital stock of which could not be purchased at any price; it was a standard modern railroad, up to date in every respect, operating over its line daily each way a large number of passenger and freight trains. The Columbus and Greenville Railway Company operating one hundred and sixty nine miles of railroad in the State of Mississippi, running at right angles from the Mississippi River east and west approximately eighteen miles in the levee district, its western terminus at Greenville, Mississippi. It had been placed in the hands of a receiver about the year 1920 and was reorganized in the year 1923. It operated its line of railroad after leaving the levee district through a non-productive hill section of the state. The condition of

its road was old, worn out, dilapidated and inferior; its buildings and operating equipment old and antiquated; the road bed was from four to six feet lower than that of the Yazoo & Mississippi Valley Railroad, and from two to four feet narrower; its locomotives were all second-hand; its rolling stock was old except four gas engines; its rails were light, its bridges of inferior construction; and, owing to the construction of the road, it was necessary to use two engines, which could only propel twenty-seven to twenty-nine freight cars; its capacity to handle freight was not more than one-fourth that of the Yazoo & Mississippi Valley Railroad; its shop equipment and machinery shops contained old and worn out machinery; its passenger coaches were dilapidated and second-hand; its locomotives were about forty years old. That only forty per cent. of the levee district lay north of Greenville. That the hazard to a railroad from the flood waters of the Mississippi River comes from the current brought about by a break in the river north of the line; that floods south of the line would inflict no serious damage. Testimony of J. H. Rigby, R. 16-34; Z. P. Hawkins, R. 34-38.

Under Chapter 118, Miss. Laws of 1926, being Section 7740 of Hemingway's Mississippi 1927 Code, the Railroad Commission of the State of Mississippi was authorized to classify railroads for payment of state privilege taxes. A copy of the act is made appendix one hereto.

The company offered to prove that under this act, the Railroad Commission of the State of Mississippi classified the Yazoo & Mississippi Valley Railroad as a first class

railroad, and classified the Columbus & Greenville Railway as a third class railroad. R. 43.

Objection was made by the appellee to the introduction of the testimony, and the same was sustained. R. 42.

The company also offered to prove that the tax commissioners of the State of Mississippi, in assessing railroad property in the State of Mississippi for ad valorem taxes, fixed the valuation of the company's property at one thousand dollars per mile; while that of the Yazoo & Mississippi Valley Railroad Company was assesesd at thirty-two thousand dollars per mile. The admission of this testimony was likewise objected to by the appellee and excluded. Judgment was entered against the company for taxes in accordance with the provisions of the act of 1914 for the full amount sued for; that is to say, a tax of $350.00 per mile, crediting the company with $50.00 per mile paid by it. R. 54.

The Columbus & Greenville Railway Company prosecuted its appeal to the Supreme Court of the State of Mississippi, and by appropriate assignment of error, reasserted the validity of the act of 1926, under the Fourteenth Amendment to the Constitution of the United States, and that said railroad company, appellant, was deprived of its property without due process of law and denied the equal protection of the law by declaring said act of 1926 invalid and enforcing against it Chapter 282 of the Mississippi Laws of 1914. R. 47.

The railway company, in its assignment of error in

the Supreme Court of the State of Mississippi, further took the position that the enforcement against it of the act of the Mississippi legislature of 1914, hereinbefore set out, under the facts and circumstances in this case, would cause said act to violate the Fourteenth Amendment to the Constitution of the United States, in that the same would deprive the railway company of its property without due process of law and deny to it the equal protection of the law.

The judgment of the Circuit Court of Montgomery County, Mississippi, complained of was affirmed. R. 54.

The court delivered the following opinion, reported 127 So. 784:

> "This case is ruled by the opinion rendered on the former appeal herein, (154 Miss. 317, 122 So. 366), to which we adhere, and the evidence excluded, if competent, as to which we express no opinion, could not have changed the results. Affirmed."

Petitioners A. T. Stovall and A. F. Gardner, Sr., became sureties on the appeal bond of the railway company to the Supreme Court of the State of Mississippi from the judgment rendered in the Circuit Court of Montgomery County, Mississippi, and join in this petition by reason thereof.

In addition to filing petition for certiorari in this case, the railway company prosecuted an appeal under Section 344, Judicial Code, U. S. C. A. from the judgment of the Supreme Court of the State of Mississippi in holding valid

and enforcing against it Chapter 282, Miss. Laws of 1914, hereinbefore referred to. R. 58-66.

This Court granted petitioner's application for writ of certiorari, ... U. S....., 75 L. Ed. 79, and passed to the final hearing the question of retaining jurisdiction on appeal.

ARGUMENT.

I.

BRIEF ON APPEAL.

(a) *Facts excluded should be treated as established.*

In the case of *Fairmont Creamery Co. v. Minn.*, 274 U. S. 1, 71 L. Ed. 893, the Court used the following language:

> "The trial court excluded this evidence as immaterial, and the supreme court approved. We may, therefore, treat the facts stated as though established and held to have no bearing on the question of guilt or the validity of the enactment."

(b) *Chapter 282, Miss. Laws of 1914, as construed and enforced in this case, violates the Fourteenth Amendment to the Constitution of the United States.*

We are reversing, for reasons which will become apparent, the order of the presentation of the points relied upon in this case, and therefore present to the Court an argument based upon the theory that Chapter 282, Miss. Laws of 1914, as construed and enforced against the rail-

way Company in this case, violates the Fourteenth Amendment to the Constitution of the United States, in that the same deprives the Railway Company of its property without due process and denies the equal protection of the laws. We are led to take this course because it is perfectly apparent that the legislature of the State of Mississippi in enacting Chapter 239, Miss. Laws of 1926, did so for the purpose of removing the injustice and discrimination created by the enforcement of the act of 1914 against appellant and petitioner.

Taxes levied by the Mississippi Levee District for levee purposes come under the class known as local improvement taxes. This has been held by the Supreme Court of Mississippi in several cases. In *Williams v. Commock*, 27 Miss. 209, it was held that a tax of five cents per acre for the purpose of building levees was a local improvement tax. In *Daily v. Swope*, 47 Miss. 367, the court said that there are two general classes of taxes—(1) general taxes, and (2) taxes for local improvements; that taxes for levee districts are local improvement taxes. In *Vasser v. George*, 47 Miss. 713, it was held that a levee tax is a "local assessment for a local improvement." In *Locke v. Dantzler Lumber Co.*, 119 Miss. 783, 81 So. 175, the question was the constitutionality of an acreage tax on all the land in Stone County for the purpose of building a road. The court sustained the constitutionality of the tax, saying:

> "It is a tax for a local improvement of this road district. It is not a tax for the purpose of raising the general revenue of the county to defray its expenses, but a special tax to defray the improvements made on the roads in this district It may be termed a tax for a local betterment or im-

provement. *It is a tax similar in all respects to the levee tax held constitutional in the case of Daily v. Swope*, 47 *Miss.* 367. In that case, the Court fully discussed the question of taxation for raising revenue generally, and taxation for local betterments or improvements. In the *Daily case* above mentioned, the Court, at great length, held that a tax for the purpose of constructing and maintaining a levee was a local improvement tax or local assessment."

(1) *Since the tax is one for a local improvement, the burden should be imposed in proportion to the benefits to be derived. There should be some reasonable presumption that substantial justice would be done.*

Under the facts disclosed by the record in this case, the benefits possible to be received by the Columbus & Greenville Railway Company are so utterly disproportionate to those had and received by the Yazoo & Mississippi Valley Railroad Company that there is not only no reasonable presumption of substantial justice, but, upon the other hand, the application of the tax of $350.00 per mile to the Columbus & Greenville Railway Company, under the facts and circumstances in this case, is arbitrary, discriminatory and unjust, bearing no relation whatsoever to the comparative benefits to be enjoyed by it.

Upon the other hand, we have the Yazoo & Mississippi Valley Railroad Company, a modern, up to date interstate carrier, forming part of the great Illinois Central System, operating a large number of trains, both passenger and freight, north and south through the entire district, con-

sisting of agricultural lands as productive as the valley of the Nile, exposed to the perils of flood from the Mississippi River, requiring a very substantial road bed, its rails, ties, bridges, shops, depots, buildings, locomotives, engines, trains and cars, the last word in railroad construction. This vast railroad enterprise is one hundred per cent. exposed to the flood waters of the Mississippi River. By the Railroad Commission of the State of Mississippi, its road bed is assessed at $32,000 per mile.

Section 186 of Chapter 118, Miss. Laws of 1926, is in the following language:

> "Sec. 186. Railroads. That section 3856 of Chapter 114 of the Code of 1906, levying privilege taxes on railroads, be and the same is hereby amended so that for the purpose of levying a privilege tax on railroads, such railroads are divided into four classes; 1st, 2nd, 3rd and narrow gauge, and privilege taxes levied on them as follows:
>
> "On each railroad of the first class, per mile, ... $45.00
> "On each railroad of the second class, per mile, ... 25.00
> "On each railroad of the third class, per mile, ... 10.00
> "On each narrow gauge railroad, per mile, ... 2.50
>
> "The Railroad Commission shall, annually, on or before the first Monday in August, classify the several railroads according to their charter and the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December, and the findings of said Railroad Com-

mission shall be certified to the Auditor of Public Accounts and the Chancery Clerk of the County through which each road or roads run; and any person or persons, natural or artificial, who shall exercise any of the privileges taxed herein, without first paying the tax and procuring the tax or license, as required by law, shall be subject to the pains and penalties imposed by Section 3894 of the Code of 1906, and to such other pains and penalties as may be otherwise provided by law."

Acting under this section, the Mississippi State Railroad Commission, in the year 1926, classified the main line of the Yazoo & Mississippi Valley Railroad as a first class railroad.

In the case of *Railroad Co. v. The State*, 70 So. 355, 110 Miss. 290, the Supreme Court of the State of Mississippi held that it was without authority to review the action of the Railroad Commission in classifying railroads; that the question was legislative in nature and not judicial.

The stock of the Yazoo & Mississippi Valley Railroad Company was shown to be unpurchasable. Upon the other hand, we have the Columbus & Greenville Railway Company, petitioner and appellant, a railroad just emerging from a receivership, operating under the most serious handicap, with a railroad assessed at one thousand dollars per mile, classified by the Mississippi State Railroad Commission under the rule announced by the Supreme Court of the State of Mississippi as a third class railroad, running at right angles to and not parallel with the Mississippi River, with only forty per cent. of the levee district lying

north of its terminus, Greenville, thereby greatly lessening its exposure to flood waters of the Mississippi River, its cars, locomotives, engines, equipment and construction being inferior, old and dilapadated, its cars and equipment secondhand, operating, after leaving the levee district, through an unfavorable hill section of the state, being an intrastate railroad; its locomotive engines not exceeding one-fourth the capacity of that of the Yazoo & Mississippi Valley Railroad Company, its capital stock utterly without value. A mere statement of the facts is sufficient to demonstrate the injustice of the act as applied to the petitioner and appellant in this case. The following authorities are directly in point:

In the case of *Gast Realty & Investment Co. v. Schneider Granite Co.*, 240 U. S. 55, 60 L. Ed. 523, this Court held that a municipal ordinance fixing the assessment against private property for the construction of public improvement was void, because the assessment was arbitrary, having no relation to the benefits conferred, using the following language:

> "The City of St. Louis is shown by this case and by others in the Missouri reports to contain tracts not yet cut into city lots, extending back from streets without encounternig a parallel street much farther than the distance within which paving could be supposed to be a benefit. See, for instance, *Gilsonite Roofing & Paving Co. v. St. Louis Fair Asso.*, 231 Mo. 589, 132 S. W. 657; *Granite Bituminous Paving Co. v. Fleming*, 251 Mo. 210, 158 S. W. 4; *Loth v. St. Louis*, 257 Mo. 399, 165 S. W. 1023; *William R. Bush Con-*

struction Co. v. Withnell, 185 Mo. App. 408, 170 S. W. 361. The ordinance, following the charter as construed, established a line determining the proportions in which the tax was to be borne that, after running not a hundred feet from the street, leaped to near five hundred feet when it encountered such a tract, and on the opposite side of the street was one hundred and fifty and two hundred and forty feet away. The differences were not based upon any consideration of difference in the benefits conferred, but were established mechanically in obedience to the criteria that the charter directed to be applied. The defendant's case is not an incidental result of a rule that, as a whole and on the average, may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as idstributing a local tax in grossly unequal proportions, not because of special considerations applicable to the parcels taxed, but in blind obedience to a rule that requires the result. And it can not be said that the ordinance as a whole may be regarded as an individual exception under a rule that promises justice in all ordinary cases. The charter provisions as applied to a city like St. Louis must be taken to contemplate such ordinances under the construction given to it by the state courts. Judgment reversed."

(2) *A tax on railroad property for a local improvement which is several times greater than that paid by the owner of other property in similar situation is a denial of the equal protection of the law, in violation of the Four-*

teenth Amendment to the Constitution of the United States.

The system of raising revenues for the Mississippi Levee District is provided by Chapter 156, Mississippi Laws of 1896, and the hereinbefore mentioned Chapter 282 of the Mississippi Laws of 1914. These statutes provide for four classes of taxation, as follows:

1. An ad valorem tax on all property, real and personal, in the Mississippi Levee District as assessed on the county assessment rolls at the rate of 5 mills on the dollar.

2. A tax on land at the rate of 5c per acre or fraction thereof.

3. A tax on all lint cotton (i. e. cotton from which the seed has been removed) at the rate of 1-5 cent per pound.

4. A tax on railroads at the rate of $350.00 per mile for main track, $210.00 per mile for branch lines, and $50.00 per mile for railroads having less than twenty-five miles in the Mississippi Levee District.

The evidence shows (record page 40) that the ad valorem tax rate for the year 1926 was four mills and for 1927 five mills. The evidence further shows (record page 70) that the Columbus & Greenville Railway was assessed for the years in question at one thousand dollars per mile and the Yazoo & Mississippi Valley Railroad was assessed at thirty-two thousand dollars per mile. Therefore, if railroads had not been put in a class to themselves, but had been left to be taxed as other property, on the basis of value and acreage, the Columbus & Greenville Railway Company would have been taxed at the rate of four dollars per mile in 1926 and five dollars per mile in 1927 plus the acreage tax on

five cents per mile. The Yazoo & Mississippi Valley Railroad, under the general ad valorem and acreage tax, would have been liable for taxes at the rate of $128.60 per mile in 1926, and $160.60 per mile in 1927.

By reason of the special classification of railroad property created by Chapter 282, Miss. Laws of 1914, taxes are demanded of both of these railroad companies at the arbitrary rate of $350.00 per mile. The statutes are not clear as to whether the arbitrary mileage tax on railroads is in addition to the advalorem and acreage taxes or in lieu thereof; but even if the mileage tax is in lieu of the ad valorem and acreage taxes, the result is that the contribution demanded by the tax collectors of the appellant railroad company is seventy times as great as that demanded of other property owners in the Mississippi Levee District in proportion to value, and thirty-two times as great as that demanded of the other railroad in the district in proportion to value.

Agricultural products are exempt from general taxation in Mississippi, and are not assessed on the county assessment rolls. The cotton tax at the rate of 1-5 cent per pound or $1.00 per bale is the substantial equivalent of ad valorem tax on cotton, a species of property which would not be taxed for levee purposes if it were not for the special cotton tax. It is a matter of common knowledge in the State of Mississippi that the finest land in the state for the purpose of raising agricultural products is that in the Mississippi Levee District. It is also a matter of common knowledge that, without the levees, this district would be subject

to annual overflows, and that cotton will not grow under water.

We repeat, in this connection, the many points of dissimilarity between the Columbus & Greenville Railway Company, petitioner and appellant, and the Yazoo & Mississippi Valley Railroad Company; the one a modern, standard, high grade interstate carrier of incalculable superiority, representing enormous value, exposed to the flood waters of the Mississippi River, equipped with new and modern locomotives, trains and cars, with a road bed of standard, superior construction, classified by the Mississippi State Railroad Commission as a first-class railroad, assessed at thirty-two thousand dollars per mile, against the Columbus & Greenville Railway assessed at one thousand dollars per mile, classified by the same Commission as a third-class railroad, possessed of the most limited railroad facilities, old, second-hand equipment, with inferior construction, and with an infinitely smaller proportionate exposure to the flood waters of the Mississippi River. A mere statement of the foregoing facts is sufficient to establish the arbitrary and discriminatory nature of the tax of $350.00 per mile, as applied to the Columbus & Greenville Railway in this case. The following authorities are directly in point:

The decisions are so numerous that we will only undertake to discuss some of the more outstanding ones. In *K. C. S. Ry. Co. vs. Road Improvement District*, 256 U. S. 658, all property in the district was assessed for benefits in varying zones, but the railroad company was assessed on a mileage basis. The Supreme Court of Arkansas held that the assessment had been honestly made, and that the mileage assess-

ment on the railroad was equivalent to its benefits. This court said:

"The settled general rule is that a state legislature may create taxing districts to meet the expense of local improvements and may fix the basis of taxation without encountering the Fourteenth Amendment, unless its action is palpably arbitrary or a plain abuse. Ordinarily, the levy may be upon lands specially benefited, according to value, position, area or the front foot rule.

"If, however, the statute providing for the tax if of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law can not stand against the complaint of one so taxed.

"The statute under consideration prescribes no definite standard for determining benefits from the proposed improvements * * * obviously the railroad companies have not been treated like individual owners, and we think the discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law. * * * Classification, of course, is permissible, but we can find no adequate reason for what has been attempted in the present case. * * * *Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality.*"

That decision fits the present case like a glove.

In *K. C. S. Ry Co. v. Ogden Levee District*, 15 Fed. (2) 637, (decided October 1926), the United States Circuit Court of Appeals, in discussing the legality of the Arkansas statute raising revenue for the purpose of building levees along the Red River by means of ad valorem taxation only, where the result was that a railroad company was made to pay an unfair proportion of the burden, the court said:

> "The law applicable to the creation of taxing districts and the assesment of property therein to pay for special improvements, such as drainage, roads, levees, etc., is well settled. Time and again the Supreme Court of the United States has laid down the rules of law which pertain to the situation shown to exist in this case."

Then, it proceeds to discuss some of the leading cases and applies the law to the facts in that case, holding that the tax on the railroad in that case was "palpably arbitrary and a plain abuse."

In *Road Improvement District vs. Missouri Pacific R. R. Co.*, 2 Fed. (2), 340, (USCCA, 1924), it was held that a railroad could not be assessed on a mileage basis for a public improvement where other property was assessed on an acreage basis, where the result was that the railroad would have to pay substantially more taxes by reason of such classification. That case was appealed to the Supreme Court of the United States and decided under the name of *Road District vs. Missouri Pacific R. R. Co.*, 274 U. S. 188, (1927), where it was held that although the railroad would receive some benefit from the road, its proportion of the cost was assessed too high where the result was to make the railroad

pay 18.2% of the cost of the road, although its land was only eight-tenths of one per cent. of the total area. This assessment against the railroad was approved by a special bill of the legislature, but the court held that the *determination of benefits by the legislature was no more binding on the courts than when the determination was made by a subordinate body.* *In Road District vs. Missouri Pacific R. R. Co.*, 275 Fed., 600, (U. S. C. C. A.), it was held that an arbitrary assessment against a railroad was void even though made by the legislature.

In *K. C. S. Ry. Co. vs. May*, 2 Fed. (2), 680, (U. S. C. A. 1924), a road district made an assessment of benefits against the railroad company, amounting to $44,000.00 per mile; whereas, lands generally were assessed at $25.00 to $40.00 per acre, whereby the railroad company would have paid twenty-four and one-fourth per cent. of the total cost of the road. The representative of the railroad company had a conference with the commission which assessed benefits, and agreed on an assessment at $10,000.00 per mile, which would have made the railroad pay only six per cent. of the total cost of the improvement. But thereafter the commissioner reduced other assessments so greatly that in the end the railroad was left to pay thirty-one per cent of the total. The railroad company brought suit to enjoin collection of the tax. The road district pleaded that the railroad had agreed on the amount of its assessment. The court held that the assessment made against the railroad must be considered in the light of assessments made against other property owners, and that even though the railroad had agreed to its assessment at a time when the assessment

against other property owners were such that the railroad would pay only six percent. of the total cost, such agreement was not binding when the assessments of other property owners were reduced, as such reduction amounted to a fraud against the railroad.

In *Thomas vs. Kans. City So. Ry. Co.*, 261 U. S. 481, it was held that where a drainage ditch would benefit about twelve hundred acres of land, of which the railroad company owned only forty acres, it was a denial of equal protection of the laws to attempt to pay for the improvement by an ad valorem tax on all property within the district where the result was that the railroad would pay more than half of the cost of the improvement.

Road Improvement Dist. vs. M. P. R. R. Co., 274 U. S. 188, 71 L. ed. 992.

An examination of the cases where railroad property has been put in a special class to itself shows that such classification is only permitted where the resulting tax will be no more than would have been paid under the ordinary method of taxation. For example, in *Great Northern Ry. Co. vs. Minnesota*, 278 U. S. 503,509, which is a very recent case, this court said:

> "We find nothing in the record to indicate that the tax under consideration plus that already collected, exceeds what would be legitimate as ordinary tax on the property valued as part of a going concern, or is relatively higher than the tax on other kinds of property."

In that case, the state levied a tax of three per cent. on the gross income of the railroad, which was sustained because the resulting taxation was no higher than would have been produced by the ordinary method.

In *Pullman Co. vs. Richardson*, 261 U. S. 330, 339, this Court sustained a California statute which levied a tax of four per cent. on the gross receipts of the Pullman Company in that state in lieu of all other taxes, using the following language:

> "A tax measured in this way * * *, which is not in excess of what would be a legitimate tax on such property value as part of a going concern, or relatively higher than taxes on other classes of property, does not discriminate against interstate commerce and is valid."

In *Galveston, etc., Ry. Co. vs. Texas*, 210 U. S. 217, 227, where a tax based on gross revenue was involved, and the lawyers were arguing whether the tax was a privilege tax or a property tax, this Court said:

> "By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution. It appears that we are to look for a practical rather than a logical or philosophical distinction."

On the other hand, classification which produces inequality in the burden of taxation is held to be a denial of the equal protection of the laws and a violation of the Fourteenth Amendment.

In *Royster Guano Co. vs. Virginia*, 253 U. S. 412, 64 L. ed. 989, a state tax was held in violation of the equal protection clause of the Fourteenth Amendment. The Court said:

> "It is unnecessary to say that 'equal protection of the laws', required by the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of taxation. But the classification must be reasonable, not arbitrary, and *must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.* The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy. (Citing many cases). Nevertheless, a discriminatory tax law can not be sustained against the complaint of a party aggrieved if the classification appears to be altogether illusory."

In the very recent case of *Louisville Gas Co.. vs. Coleman*, 277 U. S. 32, 37, decided April 30, 1928, the Court restated the well-established rule that while the states have power to classify for purposes of taxation, the classification "must be reasonable, not arbitrary, and *must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly situated shall be treated alike.*" This rule was approved by the Supreme Court of Mississippi in the present case, *Miller vs. Columbus & Greenville Railway Co.*, 122 So. 366, where the court said:

> "The ground of the appellant's contention is that this classification has no reasonable relation

> to the purpose for which the statute was enacted, but is arbitrary and unreasonable, and, therefore, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. This is so manifestly correct that the citation of authorities therefor would be supererogatory."

The mere fact that property is owned by a railroad is no reasonable basis of classification and discrimination as far as local improvements are concerned. Railroads may be classified for purposes of more convenient or logical assessment; or they may be classified and taxed by mileage tax, or a gross receipts tax, which is no more than a just equivalent of the ordinary ad valorem tax, but where the disparity between the mileage tax and the ordinary tax becomes gross, there is denial of the equal protection.

What sorts of basis of classification have been held to be reasonable? In *Houck vs. Little River Drainage District*, 239 U. S. 254 60 L. Ed. 267 this Court said: "The state, in its discretion may lay such assessments in proportion to position, frontage, area, market value, or to benefits *estimated by commissioners.*"

In *K. C. So. Ry. Co. vs. Road District*, 256 U. S. 658, 65 L. ed 1151, this Court said:

> "Ordinarily, the levy may be upon land especially benefitted according to value; position, area or the front foot rule."

In *Vasser vs. George*, 47 Miss. 713, the Supreme Court of Mississippi said: "Assessments for local improvements may be made on the basis of value, area, benefits or the front foot rule."

In the case of *Memphis & Charleston Railway Company v. C. L. Pace*, decided on January 5, 1931, the Court used the following langauge:

> "But, however the tax may be laid, if it be palpably arbitrary, and therefore a plain abuse of power, it falls within the condemnation of the due process clause. *Houck v. Little River District*, supra; *Valley Farms Co. v. Westchester*, supra; and if it be manifestly and unreasonably discriminatory it falls within the condemnation of the equal protection clause. *Gast Realty Co. v. Schneider Granite Co.*, 240 U. S. 55; *Kansas City Southern Ry. Co. v. Road Improvement District No. 6*, 256 U. S. 658; *Thomas v. Kansas City Southern Ry Co.*, 261 U. S. 481; *Road Improvement District No. V v. Missouri Pacific R. R. Co.*, 274 U. S. 188."

These several methods of classification have been approved in many cases, although there are exceptions under each of them where the result was shown to be of such obvious and extreme discrimination that it must have been known by those who made the statute. Those who enacted the plan of taxation for the Mississippi Levee District adopted two of the methods approved above, to-wit, area or acre-

age and value. It is obvious that they did not adopt the method of apportioning the tax according to benefits.

In *Smith vs. Willis*, 78 Miss. 243, the Supreme Court of Mississippi expressly stated that taxes in the Mississippi Levee District are not apportioned according to benefits. The Court said: "The doctrine of comparative benefits and graduation of levee tax servitudes does not apply to the Mississippi Levee District."

It has been held that an arbitrary assessment of benefits made by the legislature is just as unconstitutional as one made by a subordinate body. *Road District vs. Missouri Pacific R. R. Co.*, 274 U. S. 188, 71 L. ed. 992.

The special tax against railroads can not be justified on the theory that taxation in the Mississippi Levee District is based on benefits and that railroads receive more benefits than other property. Both the evidence and the law are to the contrary.

The appellee may claim that the appellant is estopped to raise the question of the unconstitutionalty of the mileage tax by the fact that the appellant paid this tax for many years. We say that there is no element of estoppel present. The mere payment of taxes for a number of years without protest does not create an estoppel to contest the constitutionality of the tax for any particular year. In *K. C. S. R. R. Co. vs. Ogden Levee District*, 15 Fed. (2) 637, at page 643, this exact question is discussed, and it was held

that payment of the levee taxes for fourteen years, during which time bonds had been issued by the District, did not create an estoppel against the railroad company. See *Sioux City Bridge Co. vs. Miller*, 12 Fed. (2) 41, 45. Other cases might be cited, but they seem unnecessary.

Furthermore, appellant has not acquiesced in this arbitrary tax of $350.00 per mile. It is some times said in decisions of courts with reference to taxation which is alleged to be unequal, that the complainant ought to have sought relief from the legislature. Well, in this case, the appellant did seek relief from the legislature first, and was successful in obtaining that relief by the amendment of 1926, which reduced the mileage tax so far as this appellant is concerned from $350.00 per mile to $50.00 per mile. The Supreme Court of Mississippi has held that reduction arbitrary and unreasonable, and, therefore, void. If the amendment of 1926 is void for that reason, then, by the same rule, the entire railroad mileage tax is void. If the railroad mileage tax should be held unconstitutional, the result would be that railroad property in the Mississippi Levee District would be liable to taxation under the general plan imposed by the act of 1896, hereinbefore mentioned, with the result that railroads would pay the ad valorem and acreage taxes. Railroads would then be taxed on the same basis as other property in the district, and there could be no claim of discrimination either in favor of or against this class of property. Appellant desires to contribute its fair proportion to the

common fund necessary to protect property within the Mississippi Levee District from the flood waters of the Mississippi River, and is willing to accept taxation on any recognized basis of spreading the burden of such taxation, which places appellant in the same class with other property generally throughout the district, whether it be on the basis of value, area or benefits determined by commissions, but it is unwilling to pay a tax which is both arbitrary and grossly excessive.

The arbitrary nature of the tax imposed upon the Columbus & Greenville Railway Company in this case, and the discrimination thereby created, are illustrated in the following cases: *Southern Ry. Co. vs. Green*, 216 U. S. 400, 54 L. ed. 536; *Royster Guano Co. vs. Virginia*, 253 U. S. 412, 64 L. ed. 989; *Schlesinger vs. Wisconsin*, 270 U. S. 230, 70 L. ed. 557; *Quaker City Cab Co. vs. Pennsylvania*, 277 U. S. 389, 72 L. ed. 927.

(3) *No judicial ascertainment of the legality of the tax.*

The tax imposed by this act is one for a local improvement, the funds to be derived for the purpose of constructing and maintaining levees and discharging obligations of the levee board therefor. Of necessity the obligation of each taxpayer must be based on the proportionate benefits received. In this case, the petitioner and appellant asserts

that the burden imposed upon it is excessive and out of proportion to benefits received, as will appear from the foregoing statement of fact. Under the circumstances, some opportunity should have been afforded the railroad company to determine judicially the validity of the tax and its proportionate part thereof. In other words, notice should have been given with an opportunity to be heard on the question of the distribution of the burden imposed.

In the case of *Bouslog vs. Gulfport*, 112 Miss. 184, 72 So. 896, it is held that where a tax is based on benefits, the statute will be unconstitutional on account of lack of due process, unless the statute itself provides an opportunity for a hearing before the assessment of benefits is made final. The court said that an arbitrary assessment according to benefits could no more be made by the legislature than it could render a judgment against a person without a hearing. This view was re-examined and affirmed in *Sick et al vs. City of Bay St. Louis*, 74 So. 272, 113 Miss. 175.

In the case of *Ohio Valley Water Co. vs. Borough*, 253 U. S. 287, 64 L. ed. 908, it appeared that the municipal authorities of the city had fixed a rate to be charged consumers for water at what was claimed to be an inadequate rate, and the supreme court of the state held that it could not review the adequacy of the rate, since the question of fact was for the determination of the municipal council. This Court held that the municipal authorities acted in a legisaltive capacity, and under an assertion of inadequate rates, the leg-

islature should have provided some judicial tribunal to review the question. The court used the following language:

> "The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. *Prentiss vs. Atlantic Coast Line R. Co.*, 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 345. *Lake Erie & W. R. Co. v. State Public Utility Commission*, 249 U. S. 422, 424, 63 L. ed. 684, 687, P. U. R. 1919D, 459, 39 Sup. Ct. Rep. 345. In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise, the order is void because in conflict with the due process clause, 14th Amendment. *Missouri P. R. Co. vs. Tucker*, 230 U. S. 340, 347, 57 L. ed. 1507, 1509, 33 Sup. Ct. Rep. 961; *Wadley Southern R. Co. vs. Georgia*, 235 U. S. 651, 660, 661, 59 L. ed. 405, 411, P. U. R. 1915A 106, 35 Sup. Ct. Rep. 214; *Missouri vs. Chicago, B. & Q. R. Co.* 241 U. S. 533, 538, 60 L. ed. 1148, 1154, 36 Sup. Ct. Rep. 715; *Oklahoma Operating Co. vs. Love*, 252 U. S. 331, 40 Sup. Ct. Rep. 338. Here, the insistence is that the Public Service Company law, as construed and applied by the supreme court, has deprived plaintiff in error of the right to be so heard; and this is true if the appeal therein specifically provided is the only clearly authorized proceeding where the commission's order may be challenged because confiscatory. Thus far plaintiff in error has not succeeded in obtaining the review for which the 14th Amendment requires the state to provide."

Other cases directly in point are Ex parte Young, 209 U. S. 123, 52 L. ed. 714; *Baker vs. Dreusedow*, 263 U. S. 137, 68 L. ed. 212; *Butters vs. Oakland*, 263 U. S. 162, 68 L. ed. 228.

We respectfully submit that this court should take jurisdiction on appeal; that Chapter 282, Miss. Laws of 1914, as construed and enforced in this case, should be held violative of the Fourteenth Amendment to the Constitution of the United States, as depriving the railway company of due process of law, and denying to it the equal protection of the law. We present this view to the court, because even if this case should be reversed on the writ of certiorari, since the view would be presented to the Supreme Court of the State of Mississippi on reversal that the act of 1926 violated Section 234 of the State Constitution, the question of the constitutionality of the act of 1914 would again be directly involved, and would require, if sustained, an additional appeal to this court.

However, if this court should be of the opinion that the Act of 1914 is invalid for the reason urged it would be unnecessary for the court to decide any other question in the case.

II.

Brief on Constitutionality of Chapter 259, Mississippi Laws of 1926.

(a) *Constitutionality of the Act of 1926 for the determination of this court.*

The appellee in this case, as tax collector, alleged in his declaration that Chapter 259, Mississippi Laws of 1926, violated Section 234 of the Constitution of the State of Mississippi, requiring the publication of acts of the Mississippi legislature affecting the revenue of a levee district. Wherefore, the appellee predicated his right to recover upon Chapter 282, Mississippi Laws of 1914, providing a privilege tax of $350.00 per mile on standard gauge railroads in the district regardless of dissimilarity in conditions affecting the railroads made liable for the tax. The appellee's right of action was predicated, judgment prayed and recovered, under said act of 1914. R. 1-4.

The Supreme Court of the State of Mississippi, which is the final interpreter of its statutes in respect to the meaning thereof, and as to whether or not such statutes conflict with the Constitution of the State, gave due consideration to the contention of appellee and decided that so far as the Constitution of the State of Mississippi was concerned, Chapter 259, Mississippi Laws of 1926, was a valid law, and that such chapter was not invalid by reason of any provision contained in the Constitution of the State of Mississippi. The court then applied the Fourteenth Amendment to the Constitution of the United States and held that Chapter 259, Mississippi Laws of 1926, violated the Fourteenth Amendment to the Constitution of the United States, in that the classification adopted, without regard to dissimilarity in conditions shown, was arbitrary and rested upon no reasonable basis, therefore, offended the Fourteenth Amendment to the Constitution of the United States. As to whether or not Chapter 259, Mississippi Laws of 1926, violates the

Fourteenth Amendment to the Constitution of the United States, involves no question of state law or practice, but requires a construction of the Fourteenth Amendment to the Constitution of the United States, as to which this Court is the final arbiter.

In the case of *Illinois Central R. R. Co. vs. Messina*, 240 U. S. 395, 60 L. ed. 709, the Supreme Court of the State of Mississippi had decided a question involving interstate commerce. Having decided the question erroneously, this Court felt called upon to reverse the decision, using the following language:

> "We are of the opinion therefore that the act was construed wrongly. Assuming, as it has been assumed, that the defendant's liability was governed otherwise by state law, it seems doubtful under the state decisions whether the plaintiff would have been allowed to recover had the court been of opinion that the act of Congress made his presence on the train illegal. *Western Union Tel. Co. vs. McLaurin*, 108 Miss. 273, LRA, 1915C, 487, 66 So. 739. And although there are expressions in the opinion below that raises a doubt, the fact that the supreme court thought it necessary to construe the act indicates that the construction was material to the result. For this reason the judgment must be reversed."

In the case of *Ward vs. Love*, 253 U. S. 17, 64 L. ed. 751, this Court used the following language:

> "The right to the exemption was a Federal right, and was specially set up and claimed as such in the petition. Whether the right was de-

nied, or not given due recognition, by the supreme court, is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of decision that were without any fair or substantial support."

Other cases directly in point are *Interstate Amusement Co. vs. Albert*, 239 U. S. 560, 60 L. ed. 439; *Truax vs. Corrigan*, 257 U. S. 312, 66 L. ed. 254; *A. & V. Ry. Co. vs. J. & E. Ry. Co.*, 271 U. S. 244, 70 L. ed. 928; *K. C. Structural Steel Co. vs. State of Arkansas*, 269 U. S. 148, 70 L. ed. 204; *Lacoste vs. Department of Conservation*, 263 U. S. 545, 68 L. ed. 437.

(b) *The act will be presumed valid and the classification will be sustained if justified from any state of facts reasonably conceived.*

In determining the constitutionailty of the act of 1926, the petitioner and appellant is entitled to have the facts excluded treated as established. In *Fairmount Creamery Co. vs. Minn.*, 274 U. S. 1, 71 L. ed. 893, this Court said, page 895:

"The trial court excluded this evidence as immaterial, and the supreme court approved. We may, therefore, treat the facts stated as though established and held to have no bearing on the question of guilt or the validity of the enactment."

The following additional authorities are directly in point: *Truax vs. Corrigan*, 257 U. S. 312, 66 L. ed. 254; *Shaffer vs. Carter*, 252 U. S. 37, 64 L. ed. 445; *Wagner vs. Covington*, 251 U. S. 95, 64 L. ed. 157; *Gilligan vs. Covington*, 251 U. S. 104, 64 L. ed. 168; *American Mfg. Co. vs. St. Louis*, 250 U. S. 459, 63 L. ed. 1084.

There is no constitutional objection to an act of a state legislature under the Fourteenth Amendment to the Constitution of the United States because applicable to only one company.

The case of *Fort Smith Light & Traction Co. vs. Board of Improvement*, 274 U. S. 387, 71 L. ed. 1112, involved an act imposing upon a street railway company obligation to pave at its own cost certain streets. The act was general in its nature, but applicable to only one company. On objection thereto as violating the Fourteenth Amendment to the Constitution of the United States, this court used the following language:

> "If a state may delegate to a municipality power to require paving by a street railway located within its limits, (*Durham Pub. Ser. Co. vs. Durham, supra*), we perceive no reason why it may not, by a legislative act, make a like requirement limited to a single municipality."

This is in accord with the decisions of the Supreme Court of the State of Mississippi construing its own statutes. In the case of *Memphis & C. Ry. Co. vs. Bullen*, 121 So. 826, 154 Miss. 536, the court used the following language:

"Where a law is broad enough to reach every portion of the state and to embrace within its provisions every person and thing distinguished by marked characteristics of sufficient importance to make them clearly a class by themselves, is not a local or special law, but a general law, 'even though there be but one member of the class or one place on which it operates'. 25 R. C. L., Sec. 66, p. 815, at page 818l In the case of *Toombs v. Sharkey*, 140 Miss. 676, 106 So. 273, at page 275, the language above quoted from 25 R. C. L., Sec. 66, page 818, is quoted with approval."

In the case of *Thos. M. Wampler v. Lecompte*, ... U. S. ....., 75 L. Ed. 121, advance sheets, this Court used the following language:

"Nor is the equality clause violated by the special provisions that in certain inland waters, blinds need not be placed farther apart than 250 yards. The state court, relying upon *Lindsay v. Natural Carbonic Cas Co.*, 220 U. S. 61, 78, 55 L. Ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160, said: 'Why these provisions were inserted in the statute we are not informed, but we may assume, until the contrary is shown, that a state of facts in respect thereto existed, which warranted the legislature in so legislating.' ..... Md. ....., 150 Atl. 458. This long settled rule disposes also of the alleged discrimination created by the special exemptions applicable to certain other waters of the state."

In the case of *Fort Smith Light & Traction Co. v. Board of Improvement*, 274 U. S. 387, 71 L. Ed. 1112, this Court said:

"We may not assume, in the absence of proof, that such differences do not exist. *Erb v. Morasch*, 177 U. S. 584, 44 L. Ed. 897, 20 Sup. Ct. Rep. 819; *Middleton v. Tex. P. & L. Co.* 248 U. S. 152, 63 L. Ed. 527, 39 Sup. Ct. Rep. 227; *Swiss Oil Corp. v. Shanks*, 273 U. S. 407, 47 Sup. Ct. Rep. 393.

"There are no facts disclosed by the record which would enable us to say that the legislative action with which we are herein concerned was necessarily arbitrary or unreasonable, or justify us in overruling the judgment of the state court that it was reasonable. *Durham Pub. Ser. Co. v. Durham, supra*, 67 L. Ed. 585, 43 Sup. Ct. Rep. 290. Judgment affirmed."

In the case of *Whitney v. California*, 274 U. S. 357, 71 L. Ed. 1095, this Court said:

"One who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Lindsley v. Natural Carbonic Gas* Co., 220 U. S. 62, 78, 55 L. Ed. 370, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160, and cases cited."

In the case of *Weaver v. Palmer*, 270 U. S. 402, 70 L. Ed. 654, this Court used the following language:

"Legislative determination, express or implied, are entitled to great weight; but it is always open to interested parties to show that the legislature has trangressed the limits of its power. *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 413, 67 L. Ed. 322, 325, 28 A. L. R. 1321, 43 Sup. Ct. Rep. 158. Invalidity may be shown by things

which will be judicially noticed. *Quong Wing v. Kirkendall*, 223 U. S. 59, 64, 56 L. Ed. 350, 352, 32 Sup. Ct. Rep. 192, or by facts established by evidence. The burden is on the attacking party to establish the invalidating facts. See *Minnesota Rate Cases, Simpson v. Shepard*, 230 U. S. 352, 57 L. Ed. 1511, 1563, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18."

In the case of *Dominion Hotel v. State of Arizona*, 249 U. S. 265, 63 L. Ed. 597, this Court said:

"The only question is whether we can say on our judicial knowledge that the legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. *Hebe Co. v. Shaw*, 248 U. S. 297, 303, ante 255, 258, 39 Sup. Ct. Rep. 125. Of course, this is especially true when local conditions may affect the answer,—conditions that the legislature does, but that we can not, know. *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 50, 531, 61 L. Ed. 472, 475, 476, L. R. A. 1918A, 136, 37 Sup. Ct. Rep. 190, Ann. Cases, 1917C, 594."

In the case of *Middleton v. Railroad Co.*, 249 U. S. 152, 63 L. Ed. 527, this Court said:

"The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism."

In the case of *Rast, Tax Collector, v. Vandeman*, 240 U. S. 342, 60 L. Ed. 679, this Court held that if any state of facts could be conceived that would sustain the law, the existence of such facts must be assumed, using the following language:

> "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it; and the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78, 55 L. Ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion or serious strength. It is not within the competency of the courts to arbitrate in such contrariety. *C. B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. Ed. 328, 31 Sup. Ct. Rep. 259; *German Alliance Ins Co. v. Lewis*, 233 U. S. 389, 413, 414, 59 L. Ed. 1011, 1022, 1023; L. R. A. 1915C, 1189, 34 Sup. Ct. Rep. 612; *Price v. Illinois*, 238 U. S. 446, 452, 59 L. Ed. 1400, 1405, 35 Sup. Ct. Rep. 892."

As preliminary to the authorities which we shall cite upon the question of classification, we direct the attention of the Court to the rule that classification need not depend upon scientific accuracy. *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. Ed. 552.

Nor is the Court, in determining the question, concerned with questions of lack of wisdom, crudeness, implicity, or even injustice in the state law. *Heath, etc., Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. Ed. 236.

The Supreme Court of the State of Mississippi has frequently, in order to sustain the constitutionality of acts of the Mississippi legislature imposing taxes, given expression to the well established principle that the legislature has wide latitude in matters of classification, especially for taxation. In the case of *State, ex rel. Knox, Attorney General, v. Gulf, M. & N. R. R. Co.*, 104 So. 689, 138 Miss. 70, wherein the court had under consideration the constitutionality of a graduated income tax, in disposing of objections as to arbitrary classification, the court used the following language:

> "Assuming that the equality clause of section 112 of the State Constitution applies to taxes for general purposes other than to such as ad valorem, it is well settled that the legislature may make a reasonable classification of the subjects of taxation, and, if all of the same class are taxed alike, equality clauses of both the state and federal constitutions are complied with. *Holberg v. Town of Macon*, 55 Miss. 112; *Vicksburg Bank v. Worrell, Tax Collector*, 67 Miss. 47, 7 So. 219; *Clarksdale Ins. Agency v. Cole*, 87 Miss. 637, 40 So. 228; *State v. Lawrence*, 108 Miss. 291, 66 So. 745, Ann. Cas. 1917E, 322; *City of Jackson v. Mississippi Fire Ins. Co.*, 132 Miss. 415, 95 So. 845; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 S. Ct. Rep. 533, 33 L. Ed. 892; 4 *Cooley on Taxation* (4th ed.) 704-717. See, also, authority cited under the next subdivision hereof.
>
> "The reasonableness of such a classification is in the first instance for the determination of the legislature, and the requirement therefor does not mean that the classification must be reasonable

'according to the judgment of reviewing judges, but that the court must be able to see that the legislators could regard it as reasonable and proper without doing violence to common sense.' *People v. Mensching*, 187 N. Y. 8, 79 N. E. 884, 10 L. R. A. (N. S.) 625, 10 Ann. Cas. 101; *City of Jackson v. Mississippi Fire Ins. Co.*, 132 Miss. 415, 95 So. 845. The question for decision then is: Is the classification here made of income reasonable, or can it be so regarded without doing violence to common sense? The argument on which such a classification is based is:"

The court cited with approval *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 42 L. Ed. 1037.

In the case of *State ex rel. Jordan v. Gilmer Grocery Co.*, 125 So. 710, 156 Miss. 99, the court used the following language:

"A classification is valid wherever it proceeds upon any difference which has a reasonable relation to the subject sought to be accomplished, and the difference does not have to be marked but must be palpably arbitrary. The statute may be crude, impolitic, or even unjust, and the classification may be according to general considerations and have reference to prevailing conditions. See *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 19 S. Ct. 609, 43 L. Ed. 909; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 S. Ct. 281, 43 L. Ed. 552; *Heath v. Worst*, 207 U. S. 338, 28 S. Ct. 114,

52 L. Ed. 236; *Mutual Loan Co. v. Martell*, 222 U. S. 225, 32 S. Ct. 74, 56 L. Ed. 175, Ann. Cas. 1913B, 529."

In the case of *Miller, State Tax Collector, v. Lamar Life Ins. Co. et al.*, 131 So. 282, there was presented to the court the question as to whether or not an act of the legislature of the State of Mississippi exempting from taxation domestic insurance companies, was valid. The court used the following language in sustaining the act:

> "It may have appeared, and probably did appear, to the legislature that the needs of the people of the state required the establishment and development of domestic insurance companies to guarantee to the people insurance on their lives and property. It may have appeared to it that the classification was reasonable and justified on the ground that, by the fostering care, and encouragement and aid thus granted, the establishment and success of domestic companies would be assured, thereby reducing the cost of insurance to the people of the state and causing vast sums of money which had theretofore been sent out of the state in payment of premiums for insurance to be retained therein for investment, and for utilization in the development of the resources of the state. Other reasons for the exemption might be imagined and assigned, and we are unable to say that the classification is wholly unreasonable and arbitrary, and therefore repugnant to the Fourteenth Amendment to the Federal Constitution."

(c) *The legislature of a state has a broader power of classification in matters of taxation than in other classes*

of legislation. It is only necessary that such classification be not arbitrary and rest on some reasonable basis.

The question as to whether or not the classification of railroads for taxation in the levee district is consistent with the Fourteenth Amendment to the Constitution of the United States necessarily depends for its determination upon the situation which presents itself to the state legislature at the time of the passage of the act.

At the 1926 session of the legislature of the State of Mississippi, it was doubtless of the opinion that Chapter 282 of the Mississippi Laws of 1914, taxing standard gauge railroads in the Mississippi Levee District, was unfair and discriminatory. This record discloses that it was confronted with the following facts:

(a) That there were but two standard gauge railroads in the district; one, the Yazoo & Mississippi Valley Railroad, aligned with the Illinois Central System, owning and operating north and south through the entire district, a modern, up-to-date railroad system, the construction of which was superior, its houses, buildings, shops, &c., modern and new; its locomotive engines, cars, &c., first-class, new and of the most effifcient operating capacity. In other words, that it was a first-class, up-to-date railroad, with modern equipment, operating under the most advantageous circumstances, having exposed to the flood waters of the Mississippi River enormous values. In the second place, that the only other railroad in the levee district which might be regarded as a standard gauge railroad from any standpoint, the Columbus & Greenville Railway, was the anti-

thesis of the Yazoo & Mississippi Valley Railroad. It had just emerged from receivership, operated east and west at right angles from the river; its road bed of inferior construction; its equipment old, dilapidated, out of date; its operating capacity inferior and the proportionate volume exposed to the flood waters of the Mississippi River infinitely less than that of the Yazoo & Mississippi Valley Railroad. R. 16-34.

(b) Again, the legislature was confronted with the fact that the Railroad Commission of the State of Mississippi, a body established by it for classifying railroads in Mississippi for purposes of taxation, the judgment of which was held by the Supreme Court of the State of Mississippi to be conclusive on it, 110 Miss. 290, had classified the petitioner railway company as a third-class railroad and the Yazoo & Mississippi Valley Railroad as a first-class railroad.

(c) Again, the Mississippi State Legislature was confronted with the fact that the Mississippi State Tax Commission, whose duty it was to assess for ad valorem taxes railroad property in the State of Mississippi, assessed the railroad of the petitioner at one thousand dollars per mile, while that of the Yazoo & Mississippi Valley Railroad Company was assessed at thirty-two thousand dollars per mile. R. 43, R. 70.

The petitioner in the trial court proved, or offered to prove, the foregoing facts, which were undisputed, in that the appellee neither introduced nor offered to introduce proof of any kind to the contrary, and the Supreme Court

of the State of Mississippi held that even if the facts sought to be proved were all true, such proof was irrelevent, immaterial and incompetent. Therefore, we are entitled to assume that the legislature of the State of Mississippi was necessarily of the opinion that the act of 1914 not only was not calculated to produce justice, but was absolutely arbitrary and discriminatory in its operation. In order to correct this injustice and to provide for a more just and equitable method of taxing railroads in the district, so that each standard gauge railroad would contribute to the construction and maintenance of levees within the district upon some reasonably fair basis, the act of 1926 under review was passed. We respectfully submit that the situation presented, from the undisputed facts, not only justified but required that the Columbus & Greenville Railway Company be placed in a different classification from that of the Yazoo & Mississippi Valley Railroad Company; and it is not only true that a statute, such as the act of 1926, providing for a different classification of the petitioner from that of the Yazoo & Mississippi Valley Railroad Company is consistent with the Fourteenth Amendment to the Constitution of the United States, but any act placing them upon an equal basis for the purpose of raising revenue in aid of the local improvements of constructing and maintaining levees in the district would violate the Fourteenth Amendment to the Constitution of the United States. We submit the following authorities as supporting our contention that the classification adopted by the act of 1926 was in perfect harmony with the Fourteenth Amendment to the Constitution of the United States.

In the case of *American Sugar Refining Co. v. State of Louisiana*, 179 U. S. 89, 45 L. Ed. 102, the legislature of the State of Louisiana passed a law classifying the refineries of sugar for the purpose of taxation. Persons who refined sugar produced by them were exempt from taxation. This Court held that the classification was justifiable, using the following language:

> "The power of taxation under this provision was fully considered in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892, 10 Sup. Ct. Rep. 533, in which it was said not to have been intended to prevent a state from changing its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rate of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only, and not securities; may allow or not allow deductions for indebtedness. 'All such regulations, and those of like character, so long as they proceed within reasonable limits and general use, are within the discretion of the state legislature or the people of the state in framing their constitution.' See, also, *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. Ed. 1025, 10 Sup. Ct. Rep. 593; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. Ed. 746, 19 Sup. Ct. Rep. 419.
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> "In *Pacific Express Co. v. Seibert*, 142 U. S. 339, 35 L. Ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250, a state statute defining an express company to be such as carried on the business of transportation on contracts for hire with

railroad or steamboat companies, did not invidually discriminate against the express companies defined by it, by exempting other companies carrying express matter in vehicles of their own. This case is specially pertinent to the one under consideration. See, also, *Giozza v. Tiernan*, 148 U. S. 657, 37 L. Ed. 599, 13 Sup. Ct. Rep. 721; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. Ed. 238, 14 Sup. Ct. Rep. 396; *Duncan v. Missouri*, 152 U. S. 377, 38 L. Ed. 485, 14 Sup. Ct. Rep. 570; *Western U. Teleg. Co. v. Indiana*, 165 U. S. 304, 41 L. Ed. 725, 17 Sup. Ct. Rep. 345; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. Ed. 683, 17 Sup. Ct. Rep. 305.

"The Constitution of Louisiana classifies the refiners of sugar for the purpose of taxation into those who refine the products of their own plantations, and those who engage in a general refining business, and refine sugars purchased by themselves or put in their hands by others for that purpose, imposing a tax only upon the latter class. To entitle a party to the exemption it must appear (1) that he is a farmer or a planter; (2) that he grinds the cane as well as refines the sugar and molasses; (3) that he refines his own sugar and molasses, meaning thereby the product of his own plantation. Whether he may also refine the sugar of others may be open to question; although by its express terms the act does not apply to planters who granulate syrup for other planters during the rolling season. The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws. The judgment of

the Supreme Court of the State of Louisiana is affirmed."

Bromley v. McCaughn, 280 U. S. 124, 74 L. Ed. 226, was a case in which a tax was made by Congress on the transfer by gift of property. The tax was a graduated one. Gifts aggregating fifty thousand dollars to different persons, provided the gift to any one person did not exceed five hundred dollars, were exempt from the tax. This Court held that the classification was valid, using the following language:

> "It is suggested that the schemes of graduation and exemption in the present statute, by which the tax levied upon donors of the same total amounts may be affected by the size of the gifts to individual donees, are so arbitrary and unreasonable as to deprive the taxpayer of property without due process. But similar features of state death taxes have been held not to infringe the Fourteenth Amendment, since they bear such a relation to the subject of the tax as not to 'preclude the assumption that the legislature, in enacting the taxing statute, did not act arbitrarily or without the exercise of judgment or discretion which rightfully belong to it'. *Stebbins v. Riley*, supra, 268 U. S. 145, 69 L. Ed. 889, 44 A. L. R. 1454, 45 Sup. Ct. Rep. 424. No more can they be a basis for holding that the graduation and exemption features of the present statute violate the Fifth Amendment. The answer to both questions is, no."

In the case of *Carley & Hamilton v. Snook*, 281 U. S. 66, 74 L. Ed. 704, a license tax for the registration of motor

vehicles upon a graduated basis, and which exempted from the operation of the act vehicles weighing less than three thousand pounds, was held by this Court not violative of the Fourteenth Amendment to the Constitution of the United States, using the following language:

> "Only a word need be said of appellants' contention that the exemption of all vehicles weighing less than three thousand pounds, although their loaded weight may be much more than vehicles not exempt, infringes the equal protection clause of the Fourteenth Amendment and the similar Section 21 of Article 1 of the State Constitution. That the legislature may graduate the fees according to the propensities of the vehicles to injure or to destroy the public highways, and may exempt those with respect to which this tendency is slight or nonexistent, can not be doubted. We may not assume that vehicles weighing less than three thousand pounds, with loads which they usually carry, are not of this class, or that vehicles weighing more than three thousand pounds with their accustomed burden added do not have this tendency. It is for the legislature to draw the line between the two classes. *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 300, 301, 42 L. Ed. 1037, 1045, 18 Sup. Ct. Rep. 594; *Clark v. Titusville*, 184, U. S. 329, 331, 46 L. Ed. 569, 572, 22 Sup. Ct. Rep. 382; *Quong Wing v. Kirkendall*, 223 U. S. 59, 62, 56 L. Ed. 350, 351, 32 Sup. Ct. Rep. 192; *Citizens' Teleg. Co. v. Fuller*, 229 U. S. 322, 57 L. Ed. 1206, 33 Sup. Ct. Rep. 833; *Watson v. State Comptroller*, 254 U. S. 122, 125, 65 L. Ed. 170, 175, 41 Sup. Ct. Rep. 43; *Franchise Motore Freight Ass'n v. Seavey*, 196 Cal. 77, 81, 235 Pac.

1000; *Re Smolke*, 199 Cal. 42, 48, 248 Pac. 244. *Cf. Fifth Ave. Coach Co. v. New York*, 221 U. S. 467, 484; 55 L. ed. 815, 820, 31 Sup. Ct. Rep. 709; *Packard v. Banton*, supra; *Silver v. Silver*, 280 U. S. 117, 123, ante, 221, 65 A. L. R. 939, 50 Sup. Ct. Rep 57."

In the case of *Ohio Oil Co. v. Conway*, 281 U. S. 146, 74 L. Ed. 775, there was involved a graduated severance tax upon the production of petroleum, graduated according to the gravity of the oil. This Court held that act valid, using the following language:

> "The states, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The state may tax real and personal property in a different manner. It may grant exemptions. The state is not limited to ad valorem taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. In levying such taxes, the state is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the state to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure. *Bell's Gap R. Co. v. Pennsylvania*, 134 U.

S. 232, 237, 33 L. Ed. 892, 895, 10 Sup. Ct. Rep. 533; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293, 42 L. Ed. 1037, 1042, 18 Sup. Ct. Rep. 594; *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 121, 54 L. Ed. 688, 692, 30 Sup. Ct. Rep. 496; *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 573, 54 L. Ed. 883, 887, 30 Sup. Ct. Rep. 578; *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U. S. 350, 353, 62 L. Ed. 1154, 1156, 38 Sup. Ct. Rep. 495; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 67 L. Ed. 237, 43 Sup. Ct. Rep. 83; *Oliver Iron Min. Co. v. Lord*, 262 U. S. 172, 179, 67 L. Ed. 929, 936, 43 Sup. Ct. Rep. 526; *Stebbins v. Riley*, 268 U. S. 137, 142, 69 L. Ed. 884, 888, 44 A. L. R. 1454, 45 Sup. Ct. Rep. 424."

Again, the Court used the following language:

"There are, it is true, various gravity schedules of prices, and the same fields may produce oils of different gravities, and oils broadly of the same sort may be sold at flat prices, but, if the state was at liberty to adopt a gravity scale for oils which in such large measure were sold on this basis, the state was not required to grade its tax with a nicety which would assign to every oil produced a grade absolutely corresponding to its actual values. That would mean that the state would tax only on a strictly ad valorem basis, a contention wholly inadmissible. In graduating a tax, admittedly within its power to levy, the state had a lagre discretion, and there appears to be no ground for holding that there was such an abuse in this instance as to create constitutional invalidity. *Clark v. Titusville*, 184 U. S. 329, 331, 46 L. Ed. 569, 572, 22 Sup. Ct. Rep. 382. The graduation of the tax on these oils corresponded gener-

ally to the supposed increase of gasoline content, and all oils of the same gravity were treated alike."

Again, the Court used the following language:

"The state might have concluded not to tax the former at all, and in that case, there would have been no constitutional ground of complaint because a tax was laid on the different oils of the Haynesville, Cotton Valley and Pine Islands fields. In *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 67 L. Ed. 237, 43 Sup. Ct. Rep. 83, complaint was made of a statute of Pennsylvania because it levied a tax on anthracite coal and not on bituminous coal. The contention was founded on the fact that both were fuels and that anthracite coal in steam sizes competed with bituminous coal and certain subgrades of the latter competed with certain subgrades of anthracite. The court, accepting the fact of competition, nevertheless sustained the tax, holding that the differences between the two sorts of coal justified the classification."

So, in this case, the legislature might have exempted from taxation small railroads operating a very limited mileage in the district without violating the Federal Constitution. That being true, it would certainly have the right, in the interest of uniformity and equality, to levy a smaller mileage privilege tax upon a railroad of inferior construction and low value. And this is especially true in a case like the present one where the tax is for a local improvement.

In the case of *Southwestern Oil Co. v. State of Texas*, 217 U. S. 114, 54 L. Ed. 688, this Court held that the imposition of an occupation tax on wholesale dealers in oil did

not violate the Fourteenth Amendment to the Constitution of the United States because a similar tax was not required from other wholesale dealers.

Heisler v. Thomas Colliery Co., 260 U. S. 245, 67 L. Ed. 237, involved a case where a tax was imposed on owners of anthracite coal with no similar tax imposed upon owners of bituminous coal. The Court held that there was sufficient distinction between anthracite and bituminous coal to justify the classification, using the following language:

> "The principle of that case, and its concession to the power of a state, have received expression and illustration in cases which concerned the exercise of the power in the classification of objects for taxing purposes. In *Watson v. State Comptroller*, 254 U. S. 122, 65 L. Ed. 170, 41 Sup. Ct. Rep. 43, it is said: 'Any Classification is permissible which has a reasonable relation to some permitted end of governmental action. • • • It is enough, for instance, if the Classification is reasonably founded in "the purposes and policy of taxation'." In other cases, it is said that facts which can be reasonably conceived of as having existed when the law was enacted will be assumed to justify it. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78, 55 L. Ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; *Crescent Oil Co. v. Mississippi*, 257 U. S. 129, 137, 66 L. Ed. 166, 42 Sup. Ct. Rep. 42. And it makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety'. *Rast v. Van Deman & L. Co.*, 240 U. S. 342, 357,

60 L. ed. 679, 687, L. R. A. 1917A, 421, 36 Sup. Ct. Rep. 370, and cases there cited. And, further, the purpose of the legislation may not be the correction of some definite evil, but may be only to remove 'obstacles to a greater public welfare.' See, also, as to classification by legislation and its consonance to the requirements of the Fourteenth Amendment, *District of Columbia v. Brooke*, 214 U. S. 138, 150, 53 L. Ed. 941, 945, 29 Sup. Ct. Rep. 560."

In the case of *Quong Wing v. Kirkendall*, 223 U. S. 59, 56 L. Ed. 350, this Court held that an act exempting from a license tax a laundry where not more than two women were employed was consistent with the Fourteenth Amendment to the Constitution of the United States, using the following language:

"It may make discriminations, if founded on distinctions that we can not pronounce unreasonable and purely arbitrary, as was illustrated in *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 92, 95, 45 L. Ed. 102, 103, 105, 21 Sup. Ct. Rep. 43; *Williams v. Fears*, 179 U. S. 270, 276, 45 L. Ed. 186, 189, 21 Sup. Ct. Rep. 128; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 469, 45 L. Ed. 619, 627, 21 Sup. Ct. Rep. 423."

In the case of *Silver v. Silver*, 280 U. S. 117, 74 L. Ed. 221, it is held that a state statute releasing owners of motor vehicles from responsibility for injury to guests in case of accident occasioned by ordinary negligence does not, in discriminating between gratuitous passengers in automobiles and those in other classes of vehicles, deny the equal pro-

tection of the laws. The Court used the following language:

> "It is said that the vice in the statute is not that it distinguishes between passengers who pay and those who do not, but between gratuitous passengers in automobiles and those in other classes of vehicles. But it is not so evident that no grounds exist for the distinction that we can say a priori that the classification is one forbidden as without basis, and arbitrary. See *Ohio ex rel. Clarke vs. Deckebach*, 274 U. S. 392, 397, 71 L. Ed. 1115, 1120, 47 Sup. Ct. Rep. 630."

In the case of *Stebbins vs. Riley*, 268 U. S. 137, 69 L. Ed. 884, this Court upheld the validity of a statute fixing inheritance tax which refused to permit deduction of amount paid the Federal Government for inheritance tax as applied to residuary legatees.

In the case of *Iron Mountain R. R. Co. v. Arkansas*, 240 U. S. 518, 60 L. Ed. 776, there was presented to the court for review an act of the State of Arkansas, which forbade a railroad company from conducting switching operations across public highways in cities of first and second class, with a switching crew of less than one engineer, a fireman, a foreman and three helpers. The act exempted therefrom railroads less than one hundred miles in length. The court held the classification was reasonable, using the following language:

> "The other grounds are in effect disposed of by prior decisions.

"In the case of *Chicago, R. I. & P. Co. v. Arkansas*, 219 U. S. 453, 55 L. Ed. 290, 31 Sup. Ct. Rep. 275, a statute of Arkansas was considered which required freight trains to be equipped with crews consisting of an engineer, a foreman, a conductor and three brakemen 'regardless of any modern equipment or automatic couplings and air brakes'. The statute did not apply to railroads whose line or lines did not exceed fifty miles in length, nor to any railroad, regardless of length of its line, where the freight train should consist of less than twenty-five cars. The statute was sustained on the authority of prior cases against charges of conflict with the Fourteenth Amendment and the Commerce Clause of the Constitution. We need not cite the cases relied on or repeat the argument of the court. In that case, as in this, there was controversy in the testimony and the contentions of the parties as to the necessity of the statute. It was held, however, that the controversy did not establish that the statute was an arbitrary exercise of power. *Armour & Co. v. North Dakota*, 240 U. S. 510, ante, 771, 36 Sup. Ct. Rep. 440."

The validity of the graduated Federal income tax was affirmed by this Court in *Tyee Realty Co. v. Anderson*, 240 U. S. 115, 60 L. Ed. 554; *Brushaber v. Union Pac. R. R. Co.*, 240 U. S. 1, 60 L. Ed. 493

In the case of *Wilson v New*, 243 U. S. 323, 61 L. Ed. 755, Congress passed an act establishing a permanent eight hour standard for a day's work for employees engaged in the operation of trains upon interstate railway carriers, and

providing for a temporary wage regulation. The act exempted railways independently owned and not exceeding one hundred miles in length, electric street railways and electric interurban railways, from the operation of the act. The Court said:

> "The want of equality is based upon two considerations. The one is the exemption of certain short line and electric railroads. We dismiss it because it has been adversely disposed of by many previous decisions."

In the case of *Citizens Teleg. Co. v. Fuller*, 229 U. S. 322, 57 L. Ed. 1206, the legislature of the State of Michigan imposed a tax on telephone companies, but exempted those whose gross receipts did not exceed $500.00 per annum. The Court held that the classification was proper, using the following language:

> "It may therefore be said that in taxation there is a broader power of classification than in some other exercises of legislation. There is certainly as great a power, and the rule appellant urges can not be adopted. It is inconsistent with the principle of classification and the cases which have explained the principle and the range of its legal exercise.
>
> In *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892, 10 Sup. Ct. Rep. 533, it was decided that under the power of classification there might be exemption of property, dependent upon its species, and the rates of excise might be varied upon different trades and products. And it was said that it was safe to

say 'that the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of taxation'. It was pointed out that to give it that effect would destroy the constitutional provision and laws of some of the states which, while enjoining uniformity of taxation, permitted exceptions which were deemed material and that 'it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every state, in one form or another, deems it expedient to adopt'."

In the case of *C. & O. Ry. Co. v. Conley, Atty. Gen'l*, 230 U. S. 513, 57 L. Ed. 1597, there was presented for review a statute of the State of West Virginia regulating the fare to be charged by carriers for passengers. The act did not embrace railroads of less than fifty miles in length. This Court held that the classification was reasonable, using the following language:

> "Whether the classification shall be according to the amount of passengers and freight carried or of gross or net earnings during a previous year or according to the simpler and more constant test of the length of the line of the railroad is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitution provisions securing to all the equal protection of the laws."

In the case of *New York & New Haven R. R. Co. v. New York*, 165 U. S. 628, 41 L. Ed. 853, there was presented

to the court for review a New York statute prohibiting a railroad company operating in the state to use stoves or furnaces inside of or suspended from passenger cars. The act excluded from the operation thereof railroads less than fifty miles in length. This Court justified the classification, using the following language:

> "In any event, there is no such discrimination against companies having more than fifty miles of road as to justify the contention that there has been a denial to the companies named in the act of the equal protection of the laws. The statute is uniform in its operation upon all railroad companies doing busniess in the state, of the class to which it is made applicable."

In the case of *Erb, Receiver, v. Morasch*, 177 U. S. 584, 44 L. Ed. 897, Kansas City, Missouri, passed an ordinance regulating the speed of railroad trains in the municipality. The ordinance excluded from the operation thereof a transit railway company operated by a steam dummy engine. This Court justified the classification and held the act valid.

In the case of *Clarke v. Titusville*, 184 U. S. 329, 46 L. Ed. 569, this Court had under review an ordinance of a municipality in a city in Pennsylvania, imposing a license tax upon persons carrying on certain occupations in the city. Persons in different occupations paid different amounts, and persons in the same occupation were classified by maximum and minimum sales. The Court justified the classification, using the following language:

> "Manifestly, there was inequality between the members of different classes, and that was con-

ceded in the opinion, but as manifestly there was equality between the members of each class, and that equality was held to satisfy the Fourteenth Amendment to the Constitution of the United States; and the reasoning by which that conclusion was supported is applicable to the case at bar. We met the contention accurately and squarely that there was no reasonable distinction between the classes."

In the case of *Magoun v. Ill. Trust & Savings Bank*, 170 U. S. 283, 42 L. Ed. 1037, this Court held that an act of the State of Illinois classifying taxes for inheritance tax on difference between lineal and collateral relationship to the decedent was based upon substantial distinction and not arbitrary. The Court also held that granting statutory exemptions to estates of certain sizes and amounts was a proper classification, and that the act did not violate the Fourteenth Amendment to the Constitution of the United States.

In the case of *Watson v. Comptroller of the State*, 254 U. S. 122, 65 L. Ed. 170, this Court held that an inheritance tax law which imposed an additional tax of 5% upon certain investments held by the decedent, which investments were not subject to general property taxation, was based upon proper classification. This Court said that it was not necessary that the basis for classification be deducible from the nature of the things classified.

In the case of *Chicago, R. I. R. Co. v. Ark.*, 219 U. S. 453, 55 L. Ed. 290, the State of Arkansas passed an act requiring a minimum of three brakemen for a freight train,

but excluded from the operation of the act railroads less than fifty miles in length.

In the case of *Dow v. Beidelman*, 125 U. S. 680, 31 L. Ed. 841, the legislature of Arkansas passed a statute fixing the rates to be charged by railroad companies, dividing the companies into classes on a mileage basis. This Court held that there was no more reasonable, proper or consistent method of classifying a railroad than that of a mileage basis, using the following language:

> "Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provisions securing to all the equal protection of the laws."

(d) *Mileage Classification of Railroads has an Historical Background.*

When we turn to state decisions, we find that classification of railroads upon a mileage basis also has some historical background. In the case of *Eureka Pipe Line Co. v. Halliman*, (W. Va.), 105 S. E. 506, the legislature of West Virginia passed an act imposing an occupation tax on pipe lines for transporting oil and gas. According to the classification, the lines were divided into those under and equaling ten miles. The lines under ten miles were exempt from taxation, the court using the following language:

"It is uniformly held that notwithstanding, by the Constitution of a state, taxes must be levied by equal and uniform laws, and that the equal protection of the laws is guaranteed by the Fourteenth Amendment of the Federal Constitution, a state, in the exercise of its taxing power, may classify the subjects of taxation within its limits, and so long as the classifications thus made have a reasonable basis for their existence, the tax imposed upon each member of each class is uniform, the same does not violate such constitutional limitations, 'c ting cases'. And, as declared by the Supreme Court of the United States in *Citizens Telephone Co. v. Fuller*, supra, the power to classify for the purpose of taxation is broader than such power of classification when exercised for other legislative purposes."

The case was reversed by this Court in *Eureka Pipe Line Co. v. Hallinan*, 257 U. S. 265, 66 L. Ed. 227, on entirely other grounds.

In the case of *Consumers' League v. Colorado R. Co.*, 125 Pac. 577, 53 Colo. 54, the Supreme Court of Colorado upheld an act of the State of Colorado regulating rates of carriers, which exempted from its operation railroads not exceeding twenty-five miles in length. The editor's note to the case indicates the prevalence of such legislation.

In the case of *Railway Co. v. Ark.*, 174 S. W. 223, the Supreme Court of Arkansas held an act valid providing for a full crew, which excluded small railroads therefrom.

The same legislation finds its place in the statutes of Mississippi. Sections 7906-7908, Hemingway's 1927 Code, requiring railroads to equip engines with headlights, exempting from the operation of the act small railroads; Sections 9278-9281 of the same Code prohibiting engines from backing in the night exempting from the operation thereof carriers engaged in hauling lumber; Sections 9284-9286, Hemingway's 1927 Code, known as the full crew law, exempting from the operation thereof railroads not more than fifty miles in length. These statutes are set out in the appendix.

As a matter of fact there will not be found in this country any case, state or federal, invalidating a statute classifying railroads upon a mileage basis. Upon the other hand, as said by this Court in *Dow vs. Beidelman*, supra, 125 U. S. 680, 31 L. ed. 841, a classification according to a mileage basis is the simplest and most constant; therefore, the most satisfactory.

Excluding any question of the evidence introduced or offered touching the actual facts in respect to the two railroad companies involved, then, the question must be determined upon the philosophy stated by this Court in *Rast, Tax Collector, vs. Van Deman*, supra, 240 U. S. 342, 60 L. ed. 679:

> "If any state of facts reasonably can be conceived that would sustain it, then, the existence of that state of facts at the time the law was enacted must be assumed."

It is not necessary, however, in this case that we plant ourselves upon the validity of a mileage classification per se. We are not dependent upon such a classification alone in this case. Upon the other hand, we have the small number of miles plus the many dissimilar facts and circumstances between the petitioner with its short line of railroad in the levee district and the Yazoo & Mississippi Valley Railroad with its vast transportation system to justify the distinction.

As applied to the act of 1926, the Supreme Court of the State of Mississippi held that the classification was invalid under the Fourteenth Amendment to the Constitution of the United States, regardless of the material differences in the situation of the two railroads. However, when it came to the act of 1914, it held that a tax based upon a mileage basis was valid, irrespective of the physical and economical differences shown to exist between the two railroads. As to each act, it held that extrinsic facts were irrelevant and immaterial, condemning the mileage classification in one case, upholding it in the other. The Supreme Court of the State of Mississippi could not be right in each instance, and if it is wrong as to either, this case should be reversed. We respectfully submit, however, that the decision is wrong as applied to both legislative acts under review in this record.

(e) *Appellee, State Tax Collector, in no Position to Present the Federal Question.*

W. J. Miller, State Tax Collector, is not a person within the meaning of the Fourteenth Amendment to the Constitution of the United States. The appellee, in his declara-

tion, at no time complains of any discrimination under the Fourteenth Amendment to the Constitution of the United States in respect to the act of 1926, and we respectfully submit:

(1) That he is in no position to question the validity of the act.

(2) The Fourteenth Amendment to the Constitution of the United States protects personal rights and not official.

See *Smith vs. State of Indiana*, 191 U. S. 138, 48 L. ed. 125; *Caffrey vs. Oklahoma*, 177 U. S. 346, 44 L. ed. 799; *Stewart vs. Kansas*, 239 U. S. 14, 60 L. ed. 120; *Williams vs. Riley*, 280 U. S. 78, 74 L. ed. 175; *Herbring vs. Lee*, 280 U. S. 111, 74 L. ed. 217.

Neither the Yazoo & Mississippi Valley Railroad Company nor any other taxpayer is objecting to the payment of such privilege tax as may be imposed upon it for the construction and maintenance of levees in the district as compared to that imposed upon appellant, plaintiff in error. We submit that the appellee, respondent, W. J. Miller, State Tax Collector, can not be heard to question the validity of the act of 1926. We therefore submit:

(1) That Chapter 282, Mississippi Laws of 1914, violates the Fourteenth Amendment to the Constitution of the United States for the reasons hereinbefore set out.

(2) We submit that Chapter 259, Mississippi Laws of 1926, is consistent with the Fourteenth Amendment to the

Constitution of the United States for the reasons hereinbefore set out.

(3) In any event, we respetcfully ask that the judgment of the Supreme Court of Mississippi appealed from be reversed.

Respectfully submitted,

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APPENDIX ONE

Chapter 118, Miss. Laws, 1926, Sec. 7740, Hemingway's 1927 Code.

7740. Railroads.—186. Section 3856 of Chapter 114 of the Code of 1906, levying privilege taxes on railroads, be and the same is hereby amended so that for the purpose of levying a privilege tax on railroads, such railroads are divided into four classes: 1st, 2nd, 3rd and narrow gauge, and privilege taxes levied on them as follows:

On each railroad of the first class, per mile	$45.00
On each railroad of the second class, per mile	25.00
On each railroad of the third class, per mile	10.00
On each narrow gauge railroad, per mile	2.50

The railroad commission shall, annually, on or before the first Monday in August, classify the several railroads

according to their character and the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December, and the findings of the said railroad commission shall be certified to the auditor of public accounts and the chancery clerk of the county through which each road or roads run; and any person or persons, natural or artificial, who shall exercise any of the privileges taxed herein, without first paying the tax and procuring the tax or license, as required by law, shall be subject to the pains and penalties imposed by Section 3894 of the Code of 1906, and to such other pains and penalties as may be otherwise provided by law. (Laws 1926, Chapter 118. In effect April 30, 1926).

APPENDIX TWO

Sections 7906-7908, 9278-9281, 9284-9286, Hemingway's 1927 Code.

Section 7906. To require railroads to equip engines with headlights in certain cases.—1. All railroad companies, operating or doing business in this state, are hereby required to equip and maintain each and every locomotive used by such companies to run on its main line, between sunset and sunrise, with a good and sufficient headlight, which shall consume not less than three hundred watts at the arc, and with a reflector not less than eighteen inches in diameter, and to keep the same in good condition. The word "main line," used herein, means all portions of the railway line not used as yards, spurs and side tracks. (Laws 1912, Ch. 153. In effect January 1, 1913).

Section 7907. Penalty for violations of this act.—2.

Any railroad company, violating this act in any respect shall be liable to indictment as for a misdemeanor in any county in which the locomotive not so equipped and maintained may run, and on conviction, shall be punished by a fine of not less than twenty-five dollars, nor more than five hundred dollars for each offense. (Laws 1912, Ch. 153. In effect January 1, 1913).

Section 7908. Not to apply to tramroads of logging railroads.—3. Provided this act shall not apply to tramroads, mill roads and roads engaged principally in lumber or logging transportation in connection with mills, nor to railroad systems under thirty miles long not running regular night schedules, nor to any engine, the lighting equipment of which shall have failed during the trip, if it is shown that the equipment was in efficient and effective working condition when the trip was begun, nor to switch engines going to and returning from wrecks, or sent out on the main line to bring into a terminal a train, the engine of which has become disabled. (Laws 1912, Ch. 153. In effect January 1, 1913).

Section 9278. To prohibit backing of engines at night without light and pilot.—1. It shall be unlawful for any person or corporation owning or operating a railroad as a common carrier of passengers and freight for hire in the state, to require or permit a locomotive engine to be backed on his or its line of railroad, in the night time, unless it is provided and equipped with a pilot and headlight on the rear of its tende. (Laws 1908, Ch. 95. In effect March 16, 1908).

Section 9279. Not to apply to logging railroads. Provided, however, that the provisions of this act shall not apply to railroads whose principal business is hauling logs, nor to locomotive engines running for coal or water, doubling hills, returning from trains when broken into, going to or returning from trains in the yard limits of terminal stations, nor to engines engaged in regular switching service in yards or road engines switching at intermediate stations; nor to any locomotive engines in cases of washouts, wrecks, or when going to the assistance of engines so disabled as to block the main track of a railroad. (Laws 1908, Ch. 95. In effect March 16, 1908).

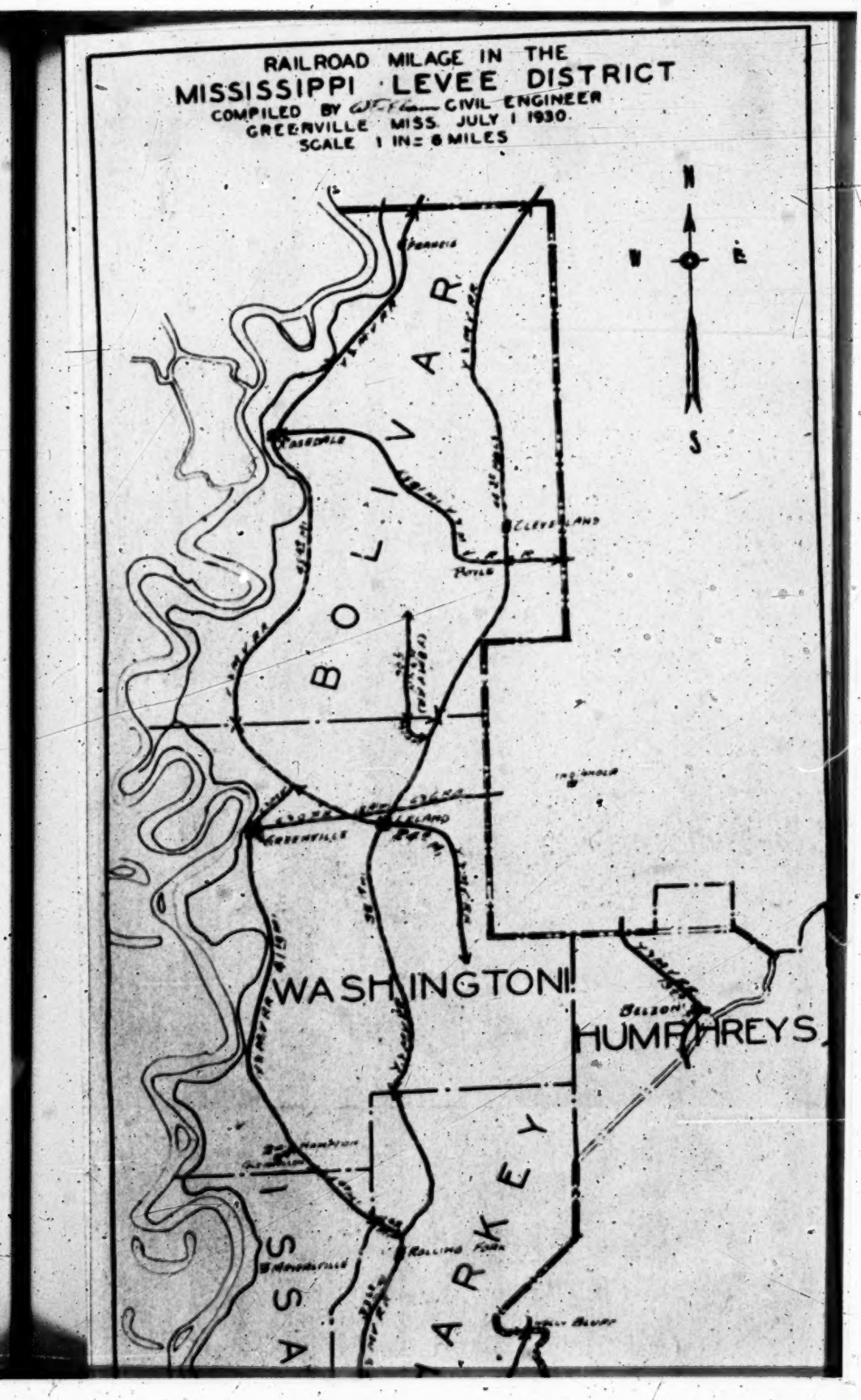
Section 9280. Penalty for violation of this act.—2. Any person or corporation violating the provisions of this act shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $100 nor more than $1000, and in addition thereto any person giving an order, permitting or requiring an employee of any railroad to violate the provisions of this act shall be guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment in the county jail not less than ten nor more than thirty days. (Laws 1908, Ch. 95. In effect March 16, 1908).

Section 9281. Damages for injuries resulting from violation of the provisions of this act shall be liable for injury or damage caused to any person by reason thereof, notwithstanding the negligence of the party injured or damaged. (Laws 1908, Ch. 95. In effect March 16, 1908).

Section 9284. Full crew law.—Prescribing number of employees for a train crew.—1. It shall be unlawful for any railroad propelled by steam doing business in the State of Mississippi, to operate or run over its lines, or any part thereof, or suffer or permit to be run over its lines, or any part thereof, outside of the yard limits, any passenger, mail or express train carrying passengers, or any freight train which is not manned with a crew consisting of one engineer, one fireman, one conductor, one brakeman or porter and one competent flagman. (Laws 1914, Ch. 170. In effect March 5, 1914).

Section 9285. Penalty for operating with short crews. —2. Any railroad company doing business in the State of Mississippi who shall send out on its road, or cause to suffer or permit to be sent out on its road, or any part thereof, outside of the yard limits, any train of the classes enumerated in Section 1, which is not manned in accordance with the provisions of that section, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1000.00) for each offense. (Laws 1914, Ch. 170. In effect March 5, 1914).

Section 9286. Act not to apply in certain cases.—3. Nothing in this act shall be held as applying to any case of disaster or disability of any member, or members, of the crew arising while out on the road between division terminals, or to relief trains, or wrecking trains where men are not available; provided, this act shall not apply to branch or independent roads not over fifty miles in length.(Laws 1914, Ch. 170. In effect March 5, 1914).


RAILROAD MILAGE IN THE
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COMPILED BY W.T. Kelton CIVIL ENGINEER
GREENVILLE MISS. JULY 1 1930.
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